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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 WALTER V. LUCAS,

11 Plaintiff,

No. CIV S-04-0586 GEB CMK P

12 vs.

13 B. ARNOLD, et al.,

14 Defendants.

15 \_\_\_\_\_ / ORDER

16 Plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983. This  
17 proceeding was referred to the undersigned by Local Rule 72-302 by the authority of 28 U.S.C. §  
18 636(b)(1). Currently pending before the court is plaintiff's motion to file a second amended  
19 complaint, which was filed on December 27, 2005. (54.)

20 On December 7, 2005, the court issued an order granting plaintiff's November 18,  
21 2005 motion to file an amended complaint. (Doc. 51.) In the December 7, 2005 order, the court  
22 screened plaintiff's amended complaint and found that the complaint stated a cognizable claim  
23 Eighth amendment claim against defendant Arnold but did not state a cognizable Fourteenth  
24 Amendment claim against Defendant Arnold. Accordingly, the court granted plaintiff thirty days  
25 to file a second amended complaint. The court cautioned plaintiff that failure to file a second  
26 amended complaint would result in the case moving forward on plaintiff's November 18, 2005

1 and a recommendation that the Fourteenth Amendment claim against defendant Arnold be  
2 dismissed. In a separate order filed on December 29, 2005, the court recommended that the claim  
3 against defendant Doe in plaintiff's November 18, 2005 amended complaint be dismissed for  
4 failure to state a claim.

5 As plaintiff was directed by the court in its December 7, 2005 order to file an  
6 amended complaint, plaintiff is not required to seek leave of the court to file a second amended  
7 complaint. Accordingly, plaintiff's second amended complaint, attached to his December 27,  
8 2005 motion as exhibit Y, is deemed filed on December 27, 2005.

9 The court is required to screen complaints brought by prisoners seeking relief  
10 against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.  
11 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised  
12 claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be  
13 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28  
14 U.S.C. § 1915A(b)(1),(2).

15 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
16 See Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
17 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
18 indisputably meritless legal theory or where the factual contentions are clearly baseless. See  
19 Neitzke, 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however  
20 inartfully pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639,  
21 640 (9th Cir. 1989); Franklin, 745 F.2d at 1227.

22 A complaint, or portion thereof, should only be dismissed for failure to state a  
23 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set  
24 of facts in support of the claim or claims that would entitle him to relief. See Lopez v. Smith, 203  
25 F.3d 1122, 1126, 1131 (9th Cir. 2000) (en banc) In reviewing a complaint under this standard, the  
26 court must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex

1 Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to the  
2 plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v. McKeithen, 395 U.S. 411, 421  
3 (1969).

4 In his amended complaint, plaintiff states that he was transported to a hospital  
5 facility for treatment for heart problems on August 1, 2002. When he arrived at the hospital, he  
6 was not asked to remove his state-issued prison pants, which, along with the handcuffs used to  
7 shackle him to the bed, identified him as an incarcerated person. Two days later, a nurse entered  
8 plaintiff's room to check plaintiff's heart monitoring machine and intravenous needles.

9 Defendant correctional officer B. Arnold and another officer came into plaintiff's room with the  
10 nurse. Plaintiff states that the officers began harassing him about wearing his state-issued prison  
11 pants. Plaintiff states that, after the nurse left the room, the defendant Arnold began using racial  
12 slurs toward plaintiff. Plaintiff states that defendant Arnold said "You black boy, take the damn  
13 pants off now" and accused plaintiff of being a "bad ass black boy from New Folsom."

14 Plaintiff states that defendant Arnold pulled the room's curtains closed to cover the  
15 windows and closed the door to the room. Defendant Arnold allegedly approached plaintiff's  
16 bedside, removed plaintiff's leg shackles and pulled plaintiff's pants down to his knees. Plaintiff  
17 attempted to pull his pants up, because he believed that defendant Arnold was attempting to rape  
18 him. At this time, plaintiff states that defendant Arnold ripped off his heart monitoring machine  
19 and ripped out one of his intravenous needles. Plaintiff states that he was then sprayed in the  
20 face with pepper spray by the other officer while defendant Arnold again attempted to remove his  
21 pants.

22 Plaintiff assigns liability to defendant Arnold for violations of the Eighth and  
23 Fourteenth Amendments.

24 Delay of, or interference with, medical treatment can amount to deliberate  
25 indifference to the serious medical needs of a prisoner in violation of the Eighth Amendment.

26 See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000). The use of excessive force can violate

1 the Eighth Amendment. See Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). The undersigned,  
2 therefore, finds that the amended complaint states a cognizable Eighth Amendment claim for  
3 relief against defendant Arnold pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b).

4 Fourteenth Amendment Equal protection claims arise when a charge is made that  
5 similarly situated individuals are treated differently without a rational relationship to a legitimate  
6 state purpose. See San Antonio School District v. Rodriguez, 411 U.S. 1 (1972). The Fourteenth  
7 Amendment's equal protection clause protects prisoners from discrimination based on race. See  
8 Wolff v. McDonnell, 418 U.S. 539, 566 (1974). Fourteenth Amendment liberty interests can arise  
9 both from the Constitution and from state law. See Hewitt v. Helms, 459 U.S. 460, 466 (1983).  
10 When deciding whether the Constitution itself protects an alleged liberty interest of a prisoner, a  
11 court should consider whether the practice in question is "within the normal range of custody  
12 which the conviction has authorized the state to impose." Meachum v. Fano, 427 U.S. 215, 225  
13 (1976). Verbal harassment alone is insufficient to establish a constitutional deprivation under 42  
14 U.S.C. § 1983. See Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). Verbal  
15 harassment intended to humiliate or endanger the inmate, however, may violate the Constitution.  
16 See Somers v. Thurman, 109 F.3d 614, 622 (9th Cir. 1997).

17 To the extent that plaintiff is alleging a Fourteenth Amendment equal protection  
18 argument, his claim must fail as he has not alleged, beyond vague conclusory statements, that he  
19 was treated differently than similarly situated prisoners. To the extent that plaintiff is alleging a  
20 Fourteenth Amendment liberty interest violation his claim may proceed. Although, plaintiff's  
21 claim is inartfully pleaded, it does not appear beyond doubt that plaintiff could prove no set of  
22 facts which would entitle him to relief. See Lopez, 203 F.3d at 1126, 1131. Therefore, the court  
23 is reluctant to dismiss plaintiff's claim at this stage of the proceedings.

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1 If the allegations of this second amended complaint are proven, plaintiff has a  
2 reasonable opportunity to prevail on the merits of this action. The court, therefore, finds that  
3 service is appropriate and will direct service by the U.S. Marshal without pre-payment of costs.  
4 Plaintiff is informed, however, that this action cannot proceed further until plaintiff complies with  
5 this order. Plaintiff is warned that failure to comply with this order may result in dismissal of the  
6 action. See Local Rule 11-110

7 Accordingly, IT IS ORDERED THAT:

8 1. Plaintiff was required to file a second amended complaint pursuant to the  
9 court's December 7, 2005 order and, therefore, was not required to seek leave of the court to file a  
10 second amended complaint;

11 2. Plaintiff's second amended complaint, which is attached as exhibit Y to his  
12 December 27, 2005 motion, is deemed filed as of December 27, 2005;

13 3. Service is appropriate for the following defendant: Defendant B. Arnold;

14 4. The Clerk of the Court shall send plaintiff one USM-285 forms, one summons,  
15 an instruction sheet and a copy of the second amended complaint filed December 27, 2005.

16 5. Within thirty days from the date of this order, plaintiff shall complete the  
17 attached Notice of Submission of Documents and submit the following documents to the court:

18 a. The completed Notice of Submission of Documents;

19 b. One completed summons;

20 c. One completed USM-285 form for each defendant listed in number 1  
21 above; and

22 d. Two copies of the endorsed amended complaint filed December 27,  
23 2005.

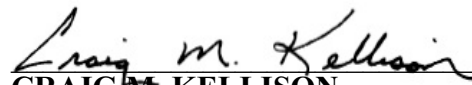
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1           6. Plaintiff need not attempt service on defendants and need not request waiver of  
2 service. Upon receipt of the above-described documents, the court will direct the United States  
3 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4  
4 without payment of costs.

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6 DATED: January 6, 2006.

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9 **CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER V. LUCAS,

Plaintiff,

No. CIV S-04-0586 GEB CMK P

vs.

B. ARNOLD, et al.,

Defendants.

NOTICE OF SUBMISSION

OF DOCUMENTS

Plaintiff hereby submits the following documents in compliance with the court's  
order filed \_\_\_\_\_:

\_\_\_\_\_ completed summons form

\_\_\_\_\_ completed USM-285 forms

\_\_\_\_\_ copies of the \_\_\_\_\_  
Second Amended Complaint

DATED:

\_\_\_\_\_  
Plaintiff